Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3–22–1168 OF 2004
BADARIAH SAHAMID JC
19 DECEMBER 2007

Companies and Corporations — Directors — Breach of fiduciary duties — Allegation of exorbitant entertainment expenses — Whether duty of courts to scrutinise invoices

Companies and Corporations — Directors — Breach of fiduciary duties — Meaning of director — Breach of duties as shadow and/or de facto directors — Degree of control or command required — Whether meaning of de facto or shadow director mutually exclusive or overlap

The 14th to 16th defendants were former directors of the plaintiff. They resigned as directors of the plaintiff on 21 June 2004. The seventeenth defendant was the son of the 14th defendant. He was neither a director nor an employee of the plaintiff. The plaintiff's claim against the 14th to 17th defendants for: (i) misappropriation of RM16m through the execution of sham sale and purchase transactions. It was not disputed that these transactions were entered into after 21 June 2004 ie, after the resignation of the 14th to 16th defendants as directors of the plaintiff. However the defendant's alleged liability was premised on the 14th to 17th defendants' breach of fiduciary duties as 'shadow directors' and/or *de facto* directors of the plaintiff at the material time; (ii) RM287,914.64 as amount incurred as entertainment expenses by the 14th to the 16th defendants during the period of 14 February 2004–21 June 2004. The 14th to 17th defendants applied to strike out the plaintiff's amended statement of claim under O 18 r 19(1)(b) and/or (c) and/or (d) of the Rules of the High Court 1980 ('RHC'). This was allowed by the deputy registrar and the plaintiff appealed.

Held, dismissing the appeal with costs:

(1) The RM16m alleged to have been misappropriated by the 14th to 17th defendants had been accounted for by parties other than the 14th to 17th defendants (see para 7(i)).

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(2) To construe a person as a shadow or *de facto* director, there must be shown the existence of a 'pattern' or 'custom' in which the shadow or *de facto* directors plays a controlling role over the *de jure* directors in respect of the management of the company (see para 22).

(3) It was clear that the issue of whether or not a person was a *de facto* or shadow director was clearly a question of mixed fact and law (*Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697) (see para 29).

(4) The evidence adduced in the instant case were comprised primarily of disparate incidents involving various employees, inferences and perceptions, that even considered in totality were clearly insufficient to support the allegations of *de facto* or shadow directorship, and a trial may not be used as a 'fishing expedition' to elicit evidence, if any of *de facto* or shadow directorship. The claim against the 14th to 17th defendants was therefore unsustainable (see para 36).

(5) The expenses incurred by the 14th to 16th defendants were incurred for the purpose for which they were intended ie, for 'entertainment'. The invoices were for food and beverage at restaurants, nightclubs as well as the services of guest relations officers. Such expenses clearly fell within the broad category of 'entertainment'. It could not be the duty of the courts to scrutinise invoices in order to determine what variety of entertainment had been enjoyed and if it was related to the ordinary business of the company, as well as whether the expenses so incurred were reasonable or extravagant. It was the responsibility of corporations which provide for such expenses to ensure that there were mechanisms or procedures in place as safeguards to verify and approve or disapprove such expenses (see para 45).

[Bahasa Malaysia summary

Defendan-defendan ke 14 sehingga ke 16 adalah bekas pengarah-pengarah plaintif. Mereka telah meletak jawatan sebagai pengarah-pengarah plaintif pada 21 Jun 2004. Defendan ke 17 adalah anak lelaki defendan ke 14. Beliau bukan seorang pengarah ataupun pekerja plaintif. Tuntutan plaintif terhadap defendan-defendan ke 14 sehingga ke 17 adalah: (i) penyalahgunaan RM16j melalui satu penyempurnaan transaksi jual beli yang palsu. Ianya tidak dipertikaikan bahawa transaksi-transaksi tersebut dimasuki selepas 21 Jun 2004 iaitu selepas defendan-defendan ke 14 sehingga ke 16 meletak jawatan sebagai pengarah-pengarah plaintif. Akan tetapi liabiliti defendan-defendan ke 14 sehingga ke 17 adalah berdasarkan atas perlanggaran kewajipan fiduisari sebagai 'pengarah-pengarah bayangan' dan/atau pengarah-pengarah '*de facto*' plaintif pada masa yang material; (ii) RM287,914.64 sebagai jumlah yang dibelanjakan sebagai perbelanjaan hiburan oleh defendan-defendan ke 14 sehingga ke 16 dalam tempoh

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14 Februari 2004–21 Jun 2004. Defendan-defendan ke 14 sehingga ke 17 telah memohon untuk membatalkan pernyataan tuntutan terpinda plaintif di bawah A 18 k 19(1)(b) dan/atau (c) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ini dibenarkan oleh penolong pendaftar dan plaintif merayu.

Diputuskan, menolak rayuan dengan kos:

(1) Jumlah RM16j yang dikatakan dilesapkan oleh defendan-defendan ke 14 sehingga ke 17 telah dipertanggungjawabkan oleh pihak-pihak selain daripada defendan-defendan ke 14 sehingga ke 17 (lihat perenggan 7(i)).

(2) Untuk mentafsirkan seseorang sebagai pengarah bayangan atau *de facto*, mesti ditunjukkan kewujudan satu 'pattern' atau 'custom' yang mana pengarah bayangan atau *de facto* memainkan satu peranan menguasai pengarah-pengarah *de jure* berhubungan dengan pengurusan syarikat tersebut (lihat perenggan 22).

(3) Ia adalah jelas bahawa isu sama ada seseorang adalah pengarah bayangan atau *de facto* adalah jelas merupakan suatu persoalan campuran fakta dan undang-undang (*Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697) (lihat perenggan 29).

(4) Keterangan yang dikemukakan dalam kes ini merangkumi kebanyakannya kejadian yang berbeza yang melibatkan pelbagai pekerja-pekerja, inferens-inferens dan tanggapan-tanggapan, dan sekiranya dipertimbangkan secara keseluruhannya adalah dengan jelas tidak mencukupi untuk menyokong alegasi-alegasi jawatan pengarah *de facto* atau bayangan, dan satu perbicaraan tidak boleh digunakan sebagai satu 'ekspedisi memancing' untuk mendapatkan keterangan, sekiranya ada akan jawatan pengarah *de facto* atau bayangan tersebut. Tuntutan terhadap defendan-defendan ke 14 sehingga ke 17 dengan ini tidak boleh dikekalkan (lihat perenggan 36).

(5) Perbelanjaan yang dibelanjakan defendan-defendan ke 14 hingga ke 16 dibelanjakan untuk tujuan yang dihasratkan iaitu untuk 'hiburan'. Invois-invois tersebut adalah untuk makanan dan minuman di restauran-restauran, kelab-kelab malam dan juga perkhidmatan pegawai perhubungan awam. Perbelanjaan sedemikian jelas jatuh di bawah kategori luas 'hiburan'. Ia bukannya kewajipan mahkamah untuk meneliti invois-invois tersebut untuk memastikan apakah hiburan pelbagai yang dinikmati dan sama ada ia berhubung dengan perniagaan biasa syarikat tersebut, dan juga sama ada perbelanjaan yang dibelanjakan adalah munasabah atau tidak. Ia adalah kewajipan syarikat-syarikat untuk memberikan perbelanjaan sedemikian untuk

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memastikan bahawa terdapat mekanisma atau prosedur yang ditetapkan sebagai perlindungan untuk menentusahkan atau membenarkan atau tidak perbelanjaan-perbelanjaan sedemikian (lihat perenggan 45).]

Notes

For cases on breach of fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 197–203.

Cases referred to

A Company (Ex parte Copp), Re [1989] BCLC 13 (refd)
Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1 (refd)
Australian Securities Commission v AS Nominees Ltd (1995) 13 ACLC 1822 (refd)
Bandar Builder Sdn Bhd & 2 Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36 (refd)
Bishopgate-lnvestment Management Ltd v Maxwell (1993) 11 ACLC 3128 (refd)
Datuk Sahar bin Arpan v PP [2007] 1 MLJ 697 (refd)
Ho v Akai Pty Ltd (in LIQ) ACN 001 500 714 NSD 923 of 2006 (refd)
Hydrodam (Corby) Ltd, Re [1994] 2 BCLC 180 (refd)
Kaytech International Plc, Re [1999] BCC 390 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227 (refd)
Lo-Line Electric Motors Ltd, Re [1988] BCLC 698 (refd)
Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors [2002] 6 MLJ 20 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
Secretary of State for Trade and Industry v Deverell & Anor [2001] Ch 340 (refd)
Standard Chartered Bank of Australia Ltd v Antico (1995) 13 ACLC 1381 (refd)
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (refd)
Unisoft Group Ltd (No 2), Re [1994] BCC 766 (refd)

Legislation referred to

Companies Act 1965 ss 4(1), 67, 132(1), 181(1), (2)
Rules of the High Court 1980 O 18 rr 19, 19(1)(b), (c), (d)

Vincent Tan (Gideon Tan Razali Zaini) for the plaintiff.
Sunil Abraham (Zul Rafique & Partners) for the 14th to 17th defendants.

Badariah Sahamid JC:

[1] Enclosure 312 before me is the plaintiff's appeal against the decision of

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the deputy registrar on 21 February 2006 in allowing the 14th to 17th defendants' application (encl 232) to strike out the plaintiff's amended statement of claim under O 18 r 19(1)(b) and/or (c) and /or (d) of the Rules of the High Court 1980.

[2] The thrust of the plaintiff's appeal is that the plaintiff's claims against the 14th to 17th defendants raises issues worthy of consideration in a full trial and are not 'so plain and obviously unsustainable' that it warrants being struck off. The test of what is to be considered as 'plain and obviously unsustainable under O 18 r 19 of the Rules of the High Court 1980 are set out in the authorities below.

[3] The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19 of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or defence.

(*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36)

Other Authorities — *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors.* [1999] 5 MLJ 558; *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368.

SUMMARY OF THE FACTS OF THE CASE

[4] The 14th to 16th defendants are former directors of the plaintiff. They resigned as directors of the plaintiff on 21 June 2004. The 17th defendant is the son of the 14th defendant. He was neither a director nor an employee of the plaintiff.

[5] The plaintiff's claim against the 14th to 17th defendants may be categorised under the following heads:

(1) Misappropriation of RM16m

(i) A claim for RM16m as the amount alleged to have been misappropriated by the 14th to 17th defendants through the execution of sham sale and purchase transactions. It is not disputed that these transactions were entered into after 21 June 2004 ie, after

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the resignation of the 14th to 16th defendants as directors of the plaintiff. However the defendant's alleged liability is premised on the 14th to 17th defendants' breach of fiduciary duties as 'shadow directors' and/or '*de facto*' directors of the plaintiff at the material time.

(2) Entertainment expenses of RM287.914.64

A claim of RM287.914.64 as the amount incurred as entertainment expenses by the 14th to the 16th defendants during the period of 14 February – 21 June 2004, ie during the tenancy of the 14th to 16th defendants as directors of the plaintiff. The plaintiff claims that the amount incurred is extravagant and wrongful and a breach of the defendants' fiduciary duties to the plaintiff.

GROUNDS OF JUDGMENT

[6] I have given careful consideration to the counsel's written as well as oral submissions before me, as well as relevant authorities on the matter and guided by the abovementioned, have arrived at the following determination.

THE CLAIM FOR RM16 MILLION

[7] The claim for RM16m against the 14th to 17th defendants cannot be sustained for the following reasons:

(i) The RM16m alleged to have been misappropriated by the 14th to 17th defendants have been accounted for by parties other than the 14th to 17th defendants.

The sixth defendant, a director of the fifth defendant has admitted receiving RM13m from the plaintiff pursuant to a sale and purchase agreement dated 2 July 2004 between the second plaintiff and the fifth defendant. The sixth defendant has admitted that he had utilised RM10m for investments in China, gave RM2m to the eighth defendant for a palm oil project and spent the remaining RM1m on gambling (encl 130).

(ii) The plaintiff had obtained a writ of seizure and sale dated 24 June 2005 against the first to fourth defendants and the sixth to eleventh defendants in respect of the same RM16m alleged to have been misappropriated by the 14th to 16th defendants (encl 296). The plaintiff did not make the 14th to 16th defendants parties in the above action. The plaintiff cannot now pursue the same amount abovementioned against the 14th to 17th defendants.

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(iii) There is insufficient material to substantiate the plaintiff's claim that the 14th to 17th defendants were *de facto* or 'shadow directors' of the plaintiff at the material time. I will forthwith elaborate on the rationale of part (iii) above mentioned.

WERE 14th to 17th DEFENDANTS DE FACTO OR SHADOW DIRECTORS?

Meaning of 'director'.

[8] According to s 4(1) of the Companies Act 1965:

> A 'director' includes any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act and an alternate or substitute director.

A director is not necessarily defined by his designation as such but rather by the dominant or controlling role that he plays in running the company. The above definition encompasses a *de facto* as well as a 'shadow director'.

[9] In a recent decision of the Court of Appeal, *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697, Justice Low Hop Bing, JCA opined ... As a shadow director, he comes within the ambit and purview of the word 'director' which is defined in s 4(1) of the Companies Act 1965 as including 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act'. The Court of Appeal cited *Company Law* by Walter Woon (2nd Ed) at pp 222 and 223 as well as the English authority of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 182. Although the Court of Appeal made no reference to the earlier case of *Omega Holdings Bhd v Dato' Tiah Thee Kian and Ors* [2002] 6 MLJ 20, it is noteworthy that in the case above mentioned Justice Vincent Ng had taken the same position.

COMMON ELEMENTS OF DE FACTO AND SHADOW DIRECTORS

[10] From judicial pronouncements the following may be summarised as the essential elements to establish the existence of *de facto* and shadow directors.

Person

[11] He may be a natural or corporate person. Thus individuals, banks as well as corporations may be construed as 'shadow directors'.

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[12] In *Re A Company (Ex parte Copp)* [1989] BCLC 13, a bank was held liable as shadow director of a company on the grounds that the bank had used its position as debenture holders to play a controlling role in the affairs of the company. In the Australian case of *Standard Chartered Bank of Australia Ltd v Antico* (1995) 13 ACLC 1381, the court held a holding company liable as a shadow director of its subsidiary on the basis of the controlling role it exercised over the board of directors of its subsidiary.

Directions or instructions

[13] He gives 'directions' and instructions' in relation to the company that can only be discharged by a director. What would amount to 'directions' and 'instructions' may be gleaned from the following authorities. In a recent Australian Federal Court case of *Ho v Akai Pty Ltd (in LIQ)* ACN 001 500 714 NSD 923 of 2006, the Federal Court in outlining the well settled principles to establish shadow directorship stated:

> … the influence or control exercised by a shadow director may be strategic in character, defining the context in which, or conditions upon which, the company operates, or else contriving the transactions of significance to the company. (Affirming *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at pp 52–53)

[14] While it is not necessary to show the existence of actual directions or instructions in order to constitute shadow directorship, there must be evidence of a controlling or commanding role exercised by the 'shadow director' over the *de jure* directors, (*Australian Securities Commission v AS Nominees* (1995) 13 ACLC 1822 at p 1838). The implications are that the *de jure* directors did not exercise any discretion or independent judgment but exhibited a pattern of acting in compliance with the directions of the shadow director. However, it is not necessary that such influence or control be exercised over the whole field of its corporate affairs, *Secretary of State for Trade and Industry v Deverell & Anor* [2001] Ch 340 at p 350. Affirmed by the Federal Court of Australia in *Ho v Akai Pty Ltd (in LIQ)* ACN 001 500 714 NSD 923 of 2006.

[15] An interesting issue arises as to what is the degree of control or command that is required to make a person a *de facto* or shadow director? Does s 4(1) require complete subservience to the *de facto* or shadow director or is compliance to the directions or instructions of the *de facto* or shadow director sufficient?

[16] This issue was raised by Morrit LJ in *Deverell*'s case at p 350. His Lordship rejected the requirement that the *de jure* directors be shown to

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have acted in a subservient role to the *de facto* or shadow director and cautioned against going beyond what is required by statute. According to His Lordship:

> … It will, no doubt be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act' 'in accordance with' such directions or instructions. It appears to me that Judge Cooke, in looking for the additional ingredient of a subservient role or the surrender of discretion by the board, imposed a qualification beyond that justified by the statutory language.

[17] I would concur with the above view and submit that the lower threshold of compliance rather than subservience to the directions and instructions of the alleged shadow director is what is required under s 4(1) of the Companies Act 1965.

Accustomed to act

[18] There is a pattern established in that the 'instructions', or 'directions' of the shadow director is customarily adhered to by the *de jure* directors.

[19] Judicial pronouncements shed light on the statutory requirement of directors being 'accustomed to act' on the directions or instructions of the shadow director.

[20] Justice Low Hop Bing JCA in *Datuk Sahar bin Arpan*, referred to '*the systematic participation of the accused in the affairs of the company*'. His Lordship also referred to *Re Unisoft Group Ltd (No 2)* [1994] BCC 766 per Harman J at pp 774–775 on the interpretation of the term shadow director and the meaning of the phrase 'accustomed to act':

> … those words can only mean … that the shadow director must be, in effect the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must be people who act on the directions or instructions of the shadow director as a matter of regular practice. That last requirement follows from the reference in the subsection to the directors being 'accustomed to act'. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct.

[21] The above echoed the dicta of Millet J in *Re Lo-Line Electric Motors Ltd* [1988] BCLC 698 at p 707:

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> In order to establish that a person was a 'shadow director' as defined in s 22(5) of the 1986 Act there had to be proof of a pattern of conduct in which a *de jure* director of a company was accustomed to act on the instructions or directions of the alleged shadow director and in order to establish that a person was a *de facto* director it was necessary to show that he undertook functions in relation to the company which could properly be discharged only by a director. The test for a shadow director was not satisfied if all that could be shown was that a *de jure* director acted on the instructions or directions of the alleged shadow director in relation to one event at the end of the company's life.

[22] Thus to construe a person as a shadow or *de facto* director, there must be shown the existence of a 'pattern' or 'custom' in which the shadow or *de facto* directors plays a controlling role over the *de jure* directors in respect of the management of the company.

DISTINCTION BETWEEN DE FACTO AND SHADOW DIRECTOR

[23] Since the plaintiff's allegation is that the 14th to 17th defendants had acted as shadow or *de facto* directors of the plaintiff, it is necessary to consider the meaning of the two terms.

[24] While on occasion the terms *de facto* and shadow director have been used interchangeably, recent judicial pronouncements have made a distinction between them in the following terms.

[25] In the case of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at p 183 Millet J distinguished between *de facto* and shadow directors in the following terms:

> The terms do not overlap. They are alternatives and in most and perhaps all cases are mutually exclusive. A *de facto* director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level. A *de facto* director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director of the company.

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[26] It would seem from the above that what may distinguish a *de facto* from a shadow director is that a *de facto* director though not validly appointed as such, purports or claims or holds himself out to be a director. On the other hand, a shadow director may, but not necessarily in all cases acts as a director, but conceals or hides his role as such.

[27] While Millet J in *Re Hydrodam (Corby) Ltd* appears to draw a distinction between the two concepts, there is recent judicial dicta that the two terms are not mutually exclusive and it is possible that a person conducts himself in a mixture of both (*Re Kaytech International Plc* [1999] BCC 390).

[28] In my opinion, whether the two terms are mutually exclusive or overlap would depend on the particular facts and circumstances of each individual case.

EVIDENTIAL BURDEN

[29] It is clear that the issue of whether or not a person is a *de facto* or shadow director is a clearly a question of mixed fact and law, (*Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697). The question to be asked may be summarised as follows:

> Have the plaintiffs succeeded in establishing the essential elements of *de facto* or and shadow directorship as required by s 4(1) of the Companies Act? Or to put in another way, have the plaintiff adduced sufficient evidence to demonstrate that the 14th to 17th defendants had given instructions or directions discharged in the capacity of directors and that those directions or instructions were shown to have been customarily complied with by the *de jure* directors?

[30] The plaintiff had sought to prove their allegations of the *de facto* or shadow directorship of the 14th to the 16th defendants by tendering to the court, inter alia, the following particulars:

(i) the sham sale and purchase agreement was entered into on 2 July 2004, a mere 11 days after the resignation of the 14th to 16th defendants as directors, drawing an inference that the 14th to 16th defendants must have played a dominant role in its planning and execution;

(ii) the 'suspicious' movement of funds around the material time (no details were given as to why they were 'suspicious');

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(iii) at the material time an unusual amount of documents were shredded, inferring that the 14th to 17th defendants were involved in some wrongdoing and were disposing of the evidence;

(iv) certain employees were approached and asked to resign from their posts, allegedly on the instructions of the 14th to 17th defendants;

(v) certain *de jure* directors had been appointed as directors by the 14th to 16th defendants, inferring that they were under the control of the 14th to 16th defendants;

(vi) the 17th defendant had inquired and was 'consistently informed of the factory operations and production figures' after the resignation of the 14th to 16th defendants; and

(vii) testimonies of various employees that they continue to regard the 14th to 16th defendants as their 'bosses' post resignation.

[31] There were no particulars of directions or instructions from the 14th to 17th defendants to the *de jure* directors in respect of the sham sale and purchase transaction that had resulted in a RM16m loss to the plaintiffs. Neither is there shown to be a pattern of the *de jure* directors of the plaintiff at the material time adhering to the directions of the 14th to 17th defendants in respect of the management of the company. There were also no particulars before me indicative of the 14th to 17th defendants purporting or holding themselves out to be *de facto* directors. In my opinion what has been adduced falls far short of the necessary elements that establish the 14th to 17th defendants as *de facto* or of shadow directors. The particulars put before me relate to matters that are primarily inferential or circumstantial. The testimonies of employees with respect to the role perceived to be played by the 14th to 16th defendants are irrelevant. In any case, at most, what the testimonies indicate is a lingering sense of the omnipresence of the defendant in the administration of the company by certain employees of the plaintiff.

[32] The plaintiff acknowledges the lack of evidence to substantiate their claim and submits that it is precisely in the nature of 'shadow directors' that they act as it were 'behind the scenes', in covert and surreptitious ways, and that evidence of shadow directorship can only be brought to light by the testimonies of witnesses in a full trial. The plaintiff counsel referred the court to the case of *Omega Holdings Sdn Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20 to substantiate the above stand.

[33] I do not disagree with the principle laid down in the above case where Justice Vincent Ng held:

> It was not appropriate to summarily strike out the plaintiff's claim because the very question of whether the first defendant was a shadow director of the plaintiff and Omega Securities (as contended by the plaintiff) was a question to be tried and determined through a discovery process or cross examination of the witnesses.

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[34] Certainly, if there are sufficiently clear evidence that parties alleged to be *de facto* or shadow directors had played a controlling role, the court would not hesitate to move for a trial in order to unveil further particulars. The facts in the *Omega Holdings* case bears this out. The plaintiff brought an action against its former director, the first defendant, one named Tony Tiah, for breach of fiduciary duty owed by the first defendant to the plaintiff, in his role in fraudulently implementing an elaborate scheme which caused Omega Securities to give financial assistance to purchase the plaintiff's shares in contravention of s 67 of the Companies Act 1965. Justice Vincent Ng referred to averments that the first defendant, had himself represented and held out that he had control of over 90% of the plaintiff's shareholdings. There was also a pending criminal case against the first defendant based on the same transaction. There was therefore sufficient credible evidence of a *de facto* or shadow directorship to warrant a trial.

[35] Similarly, in the *Secretary of State for Trade and Industry v Deverell & Anor* [2001] Ch 340, the English Court of Appeal found clear and cogent evidence that the defendant was indeed a shadow director, although he was designated as a 'Consultant'. On the facts, he had entered into negotiations on behalf of the company; played a prominent role in the management of the company's affairs; there was also evidence that he 'bossed' the directors who customarily submitted to his requirements.

[36] Such is not the case here. The evidence adduced in the instant case are comprised primarily of disparate incidents involving various employees, inferences and perceptions, that even considered in totality are clearly insufficient to support the allegations of *de facto* or shadow directorship, and a trial may not be used as a 'fishing expedition' to elicit evidence, if any, of *de facto* or shadow directorship. I therefore find the above claim against the 14th to 17th defendants unsustainable.

THE CLAIM FOR ENTERTAINMENT EXPENSES

[37] The claim for RM287,914.64 as entertainment expenses incurred by the 14th to 16th defendants from February–May 2004 cannot be sustained for the following reasons.

[38] The contention of the plaintiff is that the claims were wrongful as they were extravagant and could not be shown to be linked to the primary business of the plaintiff viz oil palm.

[39] The plaintiff contends that the invoices for the above mentioned expenses relate to food and beverage at restaurants, nightclubs as well as for

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services of guest relations officers and such expenses are very far removed from the ordinary business of the plaintiff.

[40] Thus the 14th to 16th defendants had breached their fiduciary duties as directors to act bona fide in the interests of the company and to exercise their powers for their proper purpose, (s 132(1) of the Companies Act 1965; Walter Woon on *Company Law* (3rd Ed, 2005) at p 309).

[41] It is not disputed that the invoices for the above expenses had been verified and duly paid by the plaintiff's accounts executives, the officers authorised with the task. The plaintiff's argument is that the officer who verified and approved the reimbursement of the expenses was a subordinate of the 14th to 16th defendants who were directors. He was therefore not in a position to query or refuse the payment of such expenses even if they were extravagant or wrongful. The approval of such expenses, it was claimed was therefore not indicative that such expenses were reasonable or had not been improperly incurred by the 14th to 16th defendants.

[42] From the authorities it is clear that in order to succeed the plaintiff must demonstrate that the 14th to 16th defendants had acted for an improper purpose, or that they had used company funds for an improper purpose. *Bishopgate-lnvestment Management Ltd v Maxwell* (1993) 11 ACLC 3128.

[43] The expenses incurred by the 14th to 16th defendants were incurred for the purpose for which they were intended ie, for 'entertainment'. The invoices were for food and beverage at restaurants, nightclubs as well as the services of guest relations officers. Such expenses clearly fall within the broad category of 'entertainment'. In my opinion, company funds had therefore been used for the intended purpose.

[44] The plaintiff's additional argument is that they were improperly incurred because the amount spent was firstly, extravagant and secondly, was not shown to be related to the primary business of the plaintiff viz oil palm.

[45] The question that comes to mind is this: How far should courts go in investigating whether the amount claimed to have been incurred as 'entertainment expenses' were reasonably incurred and in the ordinary course of the relevant business? I am of the opinion that it cannot be the duty of the courts to scrutinise invoices in order to determine what variety of entertainment had been enjoyed and if it was related to the ordinary business of the company, as well as whether the expenses so incurred are reasonable or extravagant. It is the responsibility of corporations which provide for such expenses to ensure that there are mechanisms or procedures in place as

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safeguards to verify and approve or disapprove such expenses. In my opinion the courts should only go so far as to examine if company funds had been used for the purpose it was intended or improperly, and whether or not such expenses had been approved or authorised. To go any further would lead to the absurd situation of the courts descending into the 'marketplace' ie, the internal management of the company. It cannot be the duty of the courts to engage in an examination of the 'who, what, when, where, whys' of such expenses. And certainly courts are not equipped and should not be called upon to determine what may or may not be construed as reasonable entertainment expenses, and whether such expenses relate to the 'ordinary business' of an infinite variety of business of corporations.

[46] The case of *Re Kong Thai Sawmill (Miri) Sdn Bhd, Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Bing Leng Sung* [1978] 2 MLJ 227, lends some support to the above stand. The appellant company is a private company incorporated with the main business of extracting timber in Sarawak. In this case the minority shareholders of the appellant company brought an action under s 181(1) and (2) of the Companies Act 1965 alleging, inter alia, the misuse of company funds relating to various transactions, among them the purchase and outfitting of a motor yacht named *Berjaya Malaysia*. The hulk of a vessel had been purchased for RM48,000 and then reconstructed as a yacht at a cost of RM505,698. The running expenses of the yacht, charged to the company, were RM189,028 in 1968/1969 and RM95,910 in 1969/70. The purchase had been validated by resolution of the company. The trial judge took the view that the expenditure was authorised and impliedly that it was a matter for their discretion. The Federal Court took the opposite view. On appeal, the Privy Council, agreed with the trial judge. Lord Wilberforce said:

> These transactions may be criticised. The belief that possessions of a yacht and the use of it for intertainment promotes the company's interest may fail to convince: the originally intended use of the yacht for visiting Niah, a place inacceccible by ordinary means did not materialise: the use of it by directors … might not appeal to shareholders. But these were all matters for decision by the members of the company, and if they chose to approve expenditure of doubtful value and even a degree of extravagance that was their choice.

[47] In the instance case, the plaintiff company had made provisions for entertainment expenses; the 14th to 16th defendants had incurred the expanses on entertainment and such expenses had been duly approved by the authorised persons. Thus it can be construed that they had been properly incurred. I do not propose to investigate further whether they were extravagant or reasonable in the context of the particular business of the plaintiff for the reasons in have alluded to above.

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[48] For the reasons stated above, I uphold the deputy registrar's decision in allowing the 14th to 17th defendants' application to strike out the plaintiff's amended statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980. Enclosure 312 is dismissed with costs.

Appeal dismissed with costs.

Reported by Sally Kee